Supreme Court, U.S.
FILED
OCT 2 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1597

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

THE BOARD OF EDUCATION OF THE WESTSIDE COMMUNITY SCHOOLS, *et al.*,
Petitioners,

v.

BRIDGET C. MERGENS, *et al.*,
Respondents.

On Writ of Certiorari to United States Court of Appeals for the Eighth Circuit

---

BRIEF OF THE UNITED STATES CATHOLIC CONFERENCE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

MARK E. CHOPKO*
General Counsel

JOHN A. LIEKWEG
Associate General Counsel

UNITED STATES CATHOLIC CONFERENCE
3211 4th Street, N.E.
Washington, D.C. 20017
(202) 541-3300

*Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

BEST AVAILABLE COPY

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTEREST OF *AMICUS*	1
SUMMARY OF ARGUMENT	2
ARGUMENT	5
I. SCHOOL ADMINISTRATORS CONTRAVENE THE EQUAL ACCESS ACT WHEN THEY DISCRIMINATE AGAINST VOLUNTARY STUDENT GROUPS BECAUSE OF THE RELIGIOUS NATURE OF THEIR ACTIVITY	5
A. A Form of Remedial Civil Rights Legislation, the Equal Access Act Protects Secondary School Students Desiring to Meet Voluntarily for Religious Purposes from Discriminatory and Unfair Treatment	8
B. Westside High School Violated the Equal Access Act by Prohibiting a Student Bible Study Club to Meet Voluntarily During Nonstructional Time	10
1. In This Remedial Legislation, Congress Intended and Properly Provided Broader Protections Than Those Required Under the First Amendment	11
2. Under the Equal Access Act a Limited Public Forum Is Created When a Public Secondary School in Practice Allows Student Groups to Meet for Purposes Not Directly Related to the School Curriculum	13
3. A Limited Public Forum Within the Meaning of the Act Existed at Westside High School	16

TABLE OF CONTENTS—Continued

	Page
II. ALLOWING A VOLUNTARY STUDENT BIBLE STUDY GROUP TO MEET DURING NONINSTRUCTIONAL TIME DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE. THE ACT EFFECTS AN ACCOMMODATION OF LEGITIMATE FREE EXERCISE CONCERNS IN A WAY THAT PROTECTS RELIGIOUS LIBERTY THROUGH VOLUNTARY ACTIVITY	19
A. Allowing Students to Meet Under the Act Does Not Violate the Establishment Clouse	19
B. Accommodation of Voluntary Student Religious Groups Protects Religious Liberty Guaranteed by the First Amendment. The Establishment Clause May Not and Should Not Be Used As a Tool to Inhibit the Free Exercise of Religion	23
CONCLUSION	27

TABLE OF AUTHORITIES

CASES	Page
Abington Township v. Schempp, 374 U.S. 203 (1963)	6
Aguilar v. Felton, 473 U.S. 402 (1985)	2, 5
Bender v. Williamsport Area School Dist., 475 U.S. 534 (1986)	22
Bethel School Dist. No. 403 v. Fraser, 478 U.S. 675 (1986)	20
Board of Education v. Allen, 392 U.S. 236 (1968)	6
City of Rome v. United States, 446 U.S. 156 (1980)	11
Committee for Public Educ. and Religious Liberty v. Nyquist, 413 U.S. 756 (1973)	19
Corporation of Presiding Bishop v. Amos, 483 U.S. 327 (1987)	11
County of Allegheny v. American Civil Liberties Union, 109 S. Ct. 3086 (1989)	21, 22
Edwards v. Aguillard, 482 U.S. 578 (1987)	5, 21
Everson v. Board of Education, 330 U.S. 1 (1947)	2
Estate of Thornton v. Caldor, Inc., 472 U.S. 703 (1985)	24
Guardians Ass'n v. Civ. Serv. Comm'n of New York, 463 U.S. 582 (1983)	11
Hazelwood School Dist. v. Kuhlmeier, 108 S. Ct. 562 (1988)	8, 16, 18, 20
Hobbie v. Unemployment Appeals Comm'n of Florida, 480 U.S. 136 (1987)	23
Katzenbach v. Morgan, 384 U.S. 641 (1966)	11
Lau v. Nichols, 414 U.S. 563 (1974)	9
Lemon v. Kurtzman, 403 U.S. 602 (1971)	20
Lynch v. Donnelly, 465 U.S. 668 (1984)	2, 19, 24
McDaniel v. Paty, 435 U S. 618 (1978)	5, 26
Meek v. Pittenger, 421 U.S. 349 (1975)	23, 24
Mergens v. Board of Educ. of Westside Community School, 867 F.2d 1076, *cert. granted*, 109 S. Ct. 3240 (1989) (No. 88-1597)	*passim*
Mergens v. Board of Educ. of Westside Community Schools, No. CV-85-0-426 (D. Neb. Feb. 2, 1988), printed in Pet. App. B	13, 16, 17, 22

TABLE OF AUTHORITIES—Continued

Page

North Haven Board of Educ. v. Bell, 456 U.S. 512 (1982) 10
School Dist. of Grand Rapids v. Ball, 473 U.S. 373 (1985) 5
Student Coalition v. Lower Merion School Dist. 633 F. Supp. 1040 (E.D. La. Pa. 1986) 12
Thomas v. Review Board, 450 U.S. 707 (1981) 24
Tcherepnin v. Knight, 389 U.S. 332 (1967) 10, 14
United States v. Wiley, 78 U.S. 508 (1871) 10
Wallace v. Jaffree, 472 U.S. 38 (1985) 20, 24
Walz v. Tax Comm'n, 397 U.S. 664 (1970) 11
Wheeler v. Barrera, 417 U.S. 402 (1974) 10
Widmar v. Vincent, 454 U.S. 263 (1981) 4, 11, 12, 20, 21, 22
Wisconsin v. Yoder, 406 U.S. 205 (1972) 5, 23
Zorach v. Clauson, 343 U.S. 306 (1952) 2, 3, 23, 25, 26

CONSTITUTIONAL PROVISIONS

United States Constitution, article I, section 8 11
United States Constitution, first amendment ..... *passim*
United States Constitution, fourteenth amendment, section 5 11

STATUTES AND REGULATIONS

20 U.S.C. §§ 1681-1688 (1982) 9
20 U.S.C. §§ 2701-2792 (1982 & Supp. V 1987) 10
20 U.S.C. §§ 4071-74 (Supp. V 1987) ..... *passim*
29 U.S.C. § 794 (1982 & Supp. V 1987) 9
42 U.S.C. §§ 2000d-2000d-7 (1982 & Supp. V 1987) 9
34 C.F.R. § 104.22 (1988) 9
34 C.F.R. § 104.23 (1988) 9
34 C.F.R. § 104.33 (1988) 9
34 C.F.R. § 104.34 (1988) 9
34 C.F.R. § 104.35 (1988) 9
34 C.F.R. § 104.37 (1988) 9
34 C.F.R. § 106.36(b) (1988) 9
34 C.F.R. § 106.41 (1988) 9

TABLE OF AUTHORITIES—Continued

CONGRESSIONAL MATERIALS

Page

H.R. Rep. 98-710, 98th Cong., 2d Sess. (1984) ..3, 7, 14, 18
S. Rep. 98-357, 98th Cong., 2d Sess. (1984) 3, 6, 7, 12, 22, 25
130 *Cong. Rec.* H7723-41 (daily ed. July 25, 1984) .. 7
130 *Cong. Rec.* S8335-70 (daily ed. June 27, 1984) .. 7
130 *Cong. Rec.* H7732 (daily ed. July 25, 1984) (statement of Rep. Goodling) 15
130 *Cong. Rec.* S8341 (daily ed. June 27, 1984) (statement of Sen. Leahy) 14
130 *Cong. Rec.* S8342 (daily ed. June 27, 1984) (statement of Sen. Hatfield) 15
130 *Cong. Rec.* S8342 (daily ed. June 27, 1984) (statement of Sen. Gorton) 15
Hearings Before the Subcommittee on Elementary Secondary, and Vocational Education of the Committee on Education and Labor, House of Representatives, on H.R. 4996, 98th Cong., 2d Sess. (1984) 26

MISCELLANEOUS

American Council on Education, *The Function of the Public Schools in Dealing With Religion*, 6 (1953) 3, 25
Buzzard and Ericsson, *The Battle for Religious Liberty* (1982) 6
Gallup, "Religion in America: 50 Years, 1935-1985" (Rep. No. 236, May, 1985) 5
J. Jacobs, *Individual Rights and Institutional Authority* (1979) 8
Laycock, *Equal Access and Moments Of Silence: The Equal Status of Religious Speech By Private Speakers*, 81 Nw. U.L. Rev. 1 (1986) 12
McConnell, "Accommodation of Religion" in *The Supreme Court Review 1984* (1986) 6
R. J. Neuhaus, *The Naked Public Square* (1984) .. 6

TABLE OF AUTHORITIES—Continued

Page

Strossen, *Constitutional Analysis Of the Equal Access Act's Standards Governing Public School Student Religious Meetings*, 24 Harv. J. on Legis. 119 (1987) 12, 14, 16

L. Tribe, *American Constitutional Law* (2d ed. 1988) 26

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 88-1597

THE BOARD OF EDUCATION OF THE WESTSIDE COMMUNITY SCHOOLS, *et al.*,
Petitioners,

v.

BRIDGET C. MERGENS, *et al.*,
Respondents.

On Writ of Certiorari to United States Court of Appeals for the Eighth Circuit

BRIEF OF THE UNITED STATES CATHOLIC CONFERENCE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

INTEREST OF *AMICUS*

The United States Catholic Conference ("Conference") is a nonprofit corporation organized under the laws of the District of Columbia. Its members are the active Catholic Bishops in the United States. The Conference advocates and promotes the pastoral teaching of the Bishops in such diverse areas as education, family life, health and hospitals, social welfare, immigrant aid, poverty assistance, civic education, youth activities, and communications. When permitted by court rules and practice, the Conference files briefs as *amicus curiae* in litigation of importance to the Catholic Church and its people in the United States, particularly when the Religion Clauses of the Constitution are implicated.

The Equal Access Act protects public secondary school students who desire to exercise important First Amendment rights from discriminatory treatment at the hands of public school authorities. 20 U.S.C. §§ 4071-74 (Supp. V 1987). Because it shares this important goal, the Conference actively supported the Act during Congressional consideration. The United States Court of Appeals for the Eighth Circuit correctly decided that the Westside Community Schools had discriminated against the student Bible study club on the basis of the religious content of its activities. This Court should confirm the Congressional decision to prevent discrimination against voluntary student religious groups and thereby to protect the First Amendment rights of public school students.

Through their counsel, the parties have given consent to the filing of this brief.

SUMMARY OF ARGUMENT

The Religion Clauses of the First Amendment, properly construed in accord with their historic purposes, do not require a rigid, absolute, separation of church and state but rather affirmatively mandate accommodation of religion. *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984). *Everson v. Board of Education*, 330 U.S. 1 (1947), signaled the beginning of concerted efforts to effect a total elimination of religion from public schools. Separationist efforts at times smack of hostility and insensitivity, as well as reflect dubious constitutional doctrine. Nevertheless, the efforts to impose an absolutist separation doctrine persisted, a trend reflected in this Court's own uneven decisions. *Compare Zorach v. Clauson*, 343 U.S. 306 (1952), *with Aguilar v. Felton*, 473 U.S. 402 (1985).

This trend was felt not only in litigation, but, more significantly, also in the nation's public schools where discussion of religion and religious values was virtually eliminated. The tragic victims were the students, as explained by the American Council on Education:

> [T]o be silent about religion may be, in effect, to make the public school an antireligious factor in the community. Silence creates the impression in the minds of the young that religion is unimportant and has nothing to contribute to the solution of the perennial and ultimate problems of human life.

American Council on Education, *The Function of the Public Schools in Dealing With Religion*, 6 (1953).[1] *See* S. Rep. No. 98-357, 98th Cong., 2d Sess. 14-21 (1984). During Congressional hearings on the scope of the problem, students from every part of the country testified about being prohibited by school officials from engaging in voluntary student-initiated religious discussion or activity.[2] "Witness after witness testified about the existence of that tragic perception [of state hostility toward religious speech] among students and citizens." S. Rep. No. 98-357, 98th Cong., 2d Sess. 10 (1984).

Congress enacted the Equal Access Act ("Act") in response to the established pattern of discrimination against religious speech and student religious groups. The Act is intended to ensure fair treatment for students and to protect their First Amendment rights of free speech, free association and free exercise of religion. The Act simply requires public secondary schools that receive federal assistance to accommodate voluntary student religious groups by allowing them to meet outside of regular school hours on the same basis as other noncurriculum related student groups. 20 U.S.C. § 4071 (Supp. V 1987). As remedial legislation it is no different from numerous other civil rights statutes that limit the discretion of school districts which opt to participate in

---

[1] The American Council on Education is an independent nonprofit association which represents all accredited public and private post-secondary institutions, as well as national and regional higher education associations.

[2] *See generally* S. Rep. 98-357, 98th Cong., 2d Sess. (1984); H.R. Rep. 98-710, 98th Cong., 2d Sess. (1984).

federal programs and receive federal financial assistance. In its considered judgment, Congress acted to protect the First Amendment rights of students from discrimination by public school officials. In doing so, Congress provided broader protection than that required by the Free Exercise and Free Speech Clauses, a legitimate and proper exercise of Congressional authority.

In the present case, Westside High School has a policy and practice of allowing student groups to meet after school hours, without regard to whether the groups are narrowly tied to the school curriculum. The School features a chess club, a scuba club, community action groups and others. Nonetheless, it refused to allow students to form a voluntary Bible study club and meet on school premises after instructional hours. The United States Court of Appeals for the Eighth Circuit correctly understood that Westside's actions were patent discrimination against the students in violation of the Act. *Mergens* v. *Board of Educ. of Westside Community Schools*, 867 F.2d 1076, *cert. granted*, 109 S. Ct. 3240 (1989) (No. 88-1597). In doing so, the Eighth Circuit rejected an open-ended argument which would allow school authorities to define away the discrimination by artificial distinctions, and thereby rendering the Act meaningless.

Petitioners assert an Establishment Clause argument in an attempt to justify their discriminatory treatment of the students in this case. Allowing the student Bible study group here to meet voluntarily after regular school hours does not violate the Establishment Clause. This Court made clear in *Widmar* v. *Vincent*, 454 U.S. 263 (1981), that excluding voluntary student religious activity while permitting nonreligious groups to meet on school premises is unconstitutional. Allowing such meetings does not, at the same time, violate the Establishment Clause. That same logic applies here and *Widmar* controls.

The Eighth Circuit's decision allowing a voluntary student club under the Act reflects another even more important principle. It fully comports with the principle of religious accommodation rooted in the history and purposes of the Religion Clauses. Simply accommodating the needs of voluntary student religious groups can hardly be characterized as a violation of the Establishment Clause, which serves to buttress "the right to free exercise of religious beliefs." *Wisconsin v. Yoder*, 406 U.S. 205, 214 (1972). The Establishment Clause cannot be allowed to be used as "a sword to justify repression of religion." *McDaniel v. Paty*, 435 U.S. 618, 641 (1978) (Brennan, J., concurring). Yet this is precisely the result urged by Petitioners. This Court must reject strained applications of the Establishment Clause, such as suggested in this case, that undermine the accommodation principle embodied in the Religion Clauses.

ARGUMENT

I. SCHOOL ADMINISTRATORS CONTRAVENE THE EQUAL ACCESS ACT WHEN THEY DISCRIMINATE AGAINST VOLUNTARY STUDENT GROUPS BECAUSE OF THE RELIGIOUS NATURE OF THEIR ACTIVITY.

Religion, not just as it concerns one's own life but as it bears on public life, is vital to most Americans. As a people, we are among the most religious in the world. Gallup, "Religion in America: 50 Years, 1935-1985" (Rep. No. 236, May 1985). As a "religious people," we struggle in the 1980's, as we did in the 1950's and as we will in the 1990's, with the proper relationship between religion and our public institutions, especially it seems, our public schools. *Zorach v. Clauson*, 343 U.S. 306 (1951); *Edwards v. Aguillard*, 482 U.S. 578 (1987). In recent years, and in part perhaps because this Court's treatment of religion in *Aguilar v. Felton*, 473 U.S. 402 (1985), and *School Dist. of Grand Rapids v. Ball*, 473 U.S. 373 (1985), so radically departed from our history

and tradition,[3] the free exercise of religion has been systematically attacked whenever it appeared in public schools.[4] These battles are being initiated by those marching under a banner proclaiming a preference for a secular society as well as a secular state, and they threaten the shared social values necessary to a truly pluralistic democracy. R. J. Neuhaus, *The Naked Square* (1984). Even though there have been renewed calls for an accommodation between religion and our public institutions,[5] some are still hostile to the legitimate exercise of private religious choices in schools, while others are intimidated by the threat of vexatious litigation into denying students their right to religious expression.

During hearings on the Act, the Senate Judiciary Committee heard testimony that many school districts have banned student-initiated extracurricular religious clubs, student newspaper articles on religious topics, and student art with religious themes.[6] School districts "have even prohibited students from praying together in a school parking lot, sitting together in groups of two or more to discuss religious themes, and carrying personal Bibles on school property." [7] Numerous examples of religious discrimination were cited in both committee re-

[3] Churches provided the vast bulk of education through the first quarter of the Nineteenth Century. *Abington Township v. Schempp*, 374 U.S. 203, 238 n.7 (Brennan, J., concurring). As public schools began to share the educational burden with church schools, there remained, and still remain, many state involvements with church-related education without any violation of the First Amendment. *Board of Education v. Allen*, 392 U.S. 236, 245-46 (1968).

[4] Buzzard and Ericsson, *The Battle for Religious Liberty*, 9-12 (1982).

[5] McConnell, "Accommodation of Religion" in *The Supreme Court Review 1985* (1986).

[6] S. Rep. No. 98-357, 98th Cong., 2d Sess. 11-12 (1984).

[7] *Id.*

ports as well as during the floor debates[8] in the House and Senate on the final version of the Act. This established pattern of discrimination against religious speech prompted Congress to legislate equal access as a statutory remedy to protect student rights.

In citing the need for national legislation, the Senate Judiciary Committee concluded that "many school districts are permitting extracurricular nonreligious speech but discriminating against extracurricular religious speech." [9] Under the Act it is unlawful for any public secondary school which receives federal financial assistance and which has a limited open forum to deny equal access to, or discriminate against, any students who wish to conduct a meeting on the basis of the religious or other content of speech at such meeting. 20 U.S.C. § 4071(a). A limited public forum exists whenever a school grants an opportunity for one or more noncurriculum related student groups to meet on school premises during noninstructional time. 20 U.S.C. § 4071(b). The House Committee on Education and Labor summarized that the purposes of the Act "are to eliminate discrimination against student religious groups that occurs when such groups are denied access to school facilities and to establish a policy of fair, even-handed treatment." [10]

[8] 130 *Cong. Rec.* H7723-41 (daily ed. July 25, 1984); 130 *Cong. Rec.* S8335-70 (daily ed. June 27, 1984). Although the final language of the Act was revised after committee action, the committee reports accurately reflect the purposes of the Act and the extent and nature of the problem Congress sought to address.

[9] S. Rep. No. 98-357, 98th Cong., 2d Sess. 11 (1984).

[10] H. R. Rep. No. 98-710, 98th Cong., 2d Sess. 1 (1984).

A. A Form of Remedial Civil Rights Legislation, the Equal Access Act Protects Secondary School Students Desiring to Meet Voluntarily for Religious Purposes from Discriminatory and Unfair Treatment.

Subject to constitutional restraints, the judiciary generally accords school authorities broad discretion in education matters. J. Jacobs, *Individual Rights and Institutional Authority*, xxiv-v (1979). In matters affecting the educational content of the curriculum and gauging and responding to potential disruptions in the environment conducive to education, school officials have virtually unlimited discretion. *See Hazelwood School Dist. v. Kuhlmeier*, 108 S. Ct. 562 (1988). That discretion, however, may be restrained by actions of higher authorities and by the law. Where the Congress or a state legislature properly acts on a matter within the schools, administrators are appropriately guided in the exercise of otherwise unfettered discretion.

A familiar issue for legislative action is the protection of civil rights. By placing conditions on the receipt of federal financial aid, Congress often seeks to eliminate discrimination and to protect the civil rights of individuals. *See, infra*, notes 11-20. These numerous federal statutes limit educators' discretion in matters such as the content of materials, the provision of special educational programs, and student placement. In the absence of such a statute and a choice by school administrators to participate in federal programs, administrative discretion generally would control. Having chosen otherwise, public schools cannot complain about legislation designed to correct established patterns of discrimination, or about the Congress' constitutional authority so to legislate.

Under Title VI of the Civil Rights Act of 1964,[11] a school district may be required to provide special language courses in its curriculum in order to eliminate discrimination against foreign language speaking students. *Lau v. Nichols*, 414 U.S. 563, 568 (1974). Similarly, Title IX of the Education Amendments of 1972 [12] requires school districts to scrutinize the content of tests and other materials used in counselling and to eliminate sex bias,[13] as well as provide new programs, particularly in the area of athletics,[14] and physical plant modifications.[15] Section 504 of the Rehabilitation Act of 1973 [16] requires school districts that receive federal financial assistance to provide a free appropriate public education for handicapped students.[17] School districts are required to develop individualized educational programs for each handicapped child.[18] In addressing the needs of educationally deprived children, school districts that participate in Title I of the Elementary and Secondary Educa-

---

[11] 42 U.S.C. §§ 2000d-2000d-7 (1982 & Supp. V 1987). Title VI prohibits discrimination on the basis of race, color, and national origin in programs that receive federal financial assistance.

[12] 20 U.S.C. §§ 1681-1688 (1982). Title IX prohibits discrimination on the basis of sex in education programs.

[13] 34 C.F.R. § 106.36(b) (1988).

[14] *Id.* § 106.41.

[15] *Id.*

[16] 29 U.S.C. 794 (1982 & Supp. V 1987). Section 504 prohibits discrimination on the basis of handicap.

[17] 34 C.F.R. § 104.33 (1988).

[18] *Id.* § 104.35. Where necessary, physical modifications to buildings may be required to make them accessible. *Id.* §§ 104.22, 104.23. To the maximum extent possible, school districts must place handicapped students in regular classes with other students, *id.* § 104.34, and, if necessary, must provide nonacademic services, such as counseling and health services. *Id.* § 104.37.

tion Act of 1965 [19] must provide special remedial educational services to students, including educationally deprived students attending private schools.[20]

Like the above laws, the Act at issue here was designed by Congress to eliminate discrimination against voluntary student religious groups. Manifestly, the Act is remedial in nature.[21] Like other civil rights laws, it only requires compliance when public secondary schools receive federal financial assistance. If they do, they must allow student religious groups to meet voluntarily just like other voluntary student groups. This minimal requirement pales in comparison to the numerous other substantive limitations placed on school districts when they seek and receive federal financial assistance. School districts are not required to accept federal financial assistance and, if a secondary school deems the Act's minimal requirements too onerous, it is free to decline the assistance. *See Wheeler v. Barrera*, 417 U.S. 402, 425 (1974). Having made the choice, school administrators may not discriminate against, as is pertinent here, voluntary student religious activity.

B. Westside High School Violated the Equal Access Act by Prohibiting a Student Bible Study Club to Meet Voluntarily During Noninstructional Time.

In construing a statute, the starting point is the statutory language itself. *North Haven Board of Educ. v. Bell*, 456 U.S. 512, 520 (1982). In this case the Act only

---

[19] 20 U.S.C. §§ 2701-2792 (1982 & Supp. V 1987).

[20] *Id.* § 2727. In the case of private school children, participating school districts must design and deliver remedial services that in many instances they would not normally provide.

[21] It is well settled that remedial statutes should be construed liberally to effectuate their purposes, *Tcherepnin v. Knight*, 389 U.S 332, 336 (1967), and in favor of those whose rights are being vindicated, *United States v. Wiley*, 78 U.S. 508, 515 (1871). Thus, it is appropriate to construe the Act liberally in favor of the students here in order to protect their First Amendment rights.

applies when a public secondary school "receives Federal financial assistance" and has "a limited open forum." 20 U.S.C. § 4071(a). Here there is no dispute about either the receipt of federal financial assistance or the denial of access to the school facilities on the basis of the religious content of student activities. The only issue for the purpose of deciding whether the statute was violated is whether Westside High School has a limited public forum for the purposes of the Act.

1. *In This Remedial Legislation, Congress Intended and Properly Provided Broader Protections Than Those Required Under the First Amendment.*

In protecting the civil rights of individuals, Congress can impose stricter standards on states than that required by the constitutional provision pursuant to which the statute was enacted. *City of Rome v. United States*, 446 U.S. 156 (1980). This is true whether Congress is acting pursuant to the Spending Clause, *Guardians Ass'n v. Civ. Serv. Comm'n of City of New York*, 463 U.S. 582 (1983), or section 5 of the Fourteenth Amendment, *Katzenbach v. Morgan*, 384 U.S. 641 (1966), both of which could apply to the Act here. In the area of religious liberty, it is well established that the limits of permissible state accommodation are by no means coextensive with the noninterference mandated by the Free Exercise Clause. *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327, 334 (1987); *Walz v. Tax Comm'n*, 397 U.S. 664, 673 (1970). Congress can legislate more broadly to protect civil and religious liberties, a point evident in the Act.

Congress utilized this Court's decision in *Widmar v. Vincent*, 454 U.S. 263 (1981), as support for the Act. In *Widmar* this Court held that a public university violated the free speech rights of a student religious group by refusing to allow it to use facilities that were generally available for use by other student groups. Assuming

arguendo that *Widmar* set the initial standards for resolving equal access disputes,[22] the Act, in pertinent part, extends beyond *Widmar*. Stated simply, in *Widmar* the university recognized over 100 student groups; a failure to recognize one more group was held unfair. Under the Act the equal access requirement applies when a public secondary school allows even "one or more noncurriculum student groups to meet on school premises during noninstructional time." 20 U.S.C. § 4071(b).[23] At least one lower court has held that the Act contains a different and broader concept of limited public forum than required by *Widmar*. *Student Coalition v. Lower Merion School Dist.*, 633 F. Supp. 1040, 1043 (E.D. Pa. 1986). This conclusion is shared by commentators.[24] "The statutory 'limited open forum' is an artificial construct, and comparisons with the constitutional cases can be misleading." [25] The statutory definition is rigorous in preventing discrimination.

[22] In Argument II, we note that under *Widmar* the Act is constitutional.

[23] Congress incorporated a definition that *on its face* sweeps more broadly than *Widmar* and offers protection for student rights beyond those necessarily decided in that case. The statutory definition of limited open forum differs in several respects from the "forum" found in *Widmar*. Besides the distinction noted in the text, curriculum relatedness is a critical limiting factor in the statute, an issue on which *Widmar* did not focus. 20 U.S.C. § 4071(b), 4072(3). Finally, the Court in *Widmar* did not resolve the free exercise issue, 454 U.S. at 273 n. 13, while the Act here has the protection of free exercise rights as one of its primary purposes. S. Rep. No. 98-357, 98th Cong., 2d Sess. 3 (1984).

[24] *See* Strossen, *Constitutional Analysis Of The Equal Access Act's Standards Governing Public School Student Religious Meetings*, 24 Harv. J. on Legis. 119, 162 (1987); Laycock, *Equal Access And Moments Of Silence: The Equal Status of Religious Speech By Private Speakers*, 81 Nw. U.L. Rev. 1, 36 (1986).

[25] Laycock, *supra* note 24, at 36.

2. *Under the Equal Access Act a Limited Public Forum Is Created When a Public Secondary School in Practice Allows Student Groups to Meet for Purposes Not Directly Related to the School Curriculum.*

The triggering mechanism for application of the Act is the existence of a limited public forum as defined in section 4071(b) of the Act. Under that section a limited public forum exists whenever a public secondary school grants an offering to or opportunity for one or more noncurriculum related student groups to meet on school premises during noninstructional time. Even one such activity would mandate "equal access" for religious clubs. If there are no such groups, that is, if all clubs are tied to the curriculum, no forum is created that would encompass religious clubs under the Act. The school district here, therefore, attempts to define away its problem by expanding its notion of curriculum relatedness.

In Petitioners' view, a student group would be considered curriculum related (and not trigger the Act) if it touched in any remote way on any subjects discussed during regular instruction or if it related in any way to some vaguely defined general educational goal, such as "developing citizenship, wholesome attitudes, good human relations, knowledge and skills" that is found in School Board Policy 5680. *Mergens v. Board of Educ. of Westside Community Schools*, No. CV 85-0-426 (D. Neb. Feb. 2, 1988), *printed in* Pet. App. B 19. Under this approach school officials would effectively have unfettered discretion to decide what is or is not curriculum related for the purposes of the Act. Not only is this at odds with the construction of civil rights laws generally, but, as the Eighth Circuit held, "[a]llowing such a broad interpretation of 'curriculum-related' would make the [Act] meaningless." *Mergens*, 867 F. 2d at 1078.

It is clear that Congress was concerned that school officials not be allowed to "circumvent the intent and application of [the] Act by officially sponsoring all similar but nonreligious student-initiated groups." [26] Senator Leahy, cosponsor of the final version of the Act that passed in the Senate, expressed concern during floor debate that school boards could avoid the Act's requirements by simply adopting a resolution declaring that the school does not have a limited public forum.[27] Senator Leahy noted:

> The point is that a limited open forum should be triggered by what a school does, not by what is says. The careful wording of the current draft will protect both religious and secular interests because it speaks with clarity about what a limited open forum means.[28]

Although the Act does not define "noncurriculum related," the term on which the Petitioners rely, the legislative history of the Act indicates that the term "noncurriculum related" was intended to be quite broad.[29] This is consistent with the general rule that remedial legislation should be construed liberally. *Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967). Conversely stated, curriculum related clubs are to be viewed narrowly, for example, as those which are essentially extensions of the curriculum and aid students in learning substantive course material.[30] Senator Hatfield, a cosponsor of the final version of the Act, explained during floor debate that a limited open forum "means that the school permits

[26] H. R. Rep. No. 98-710, 98 Cong., 2d Sess. 6 (1984).

[27] 130 *Cong. Rec.* S8341 (daily ed. June 27, 1984) (statement of Sen. Leahy).

[28] *Id.*

[29] "Meeting[s]," used twelve times in section 4071, is defined to include "activities . . . not directly related to the school curriculum." 20 U.S.C. § 4072(3).

[30] *See* discussion in Strossen, *supra* note 24, at 161-62.

legitimate activities outside of the instructional activities of the school." [31] Later in the debate Senator Hatfield again referred to periods of "noninstructional activity" and went on to describe curriculum related clubs as those that are "really a kind of extension of the classroom." [32] Congressman Goodling, a former educator and floor manager of the Act, during debate in the House explained noncurriculum related to require that "the school or a school teacher require or directly encourage student participation in such group in connection with curriculum course work." [33]

Significantly, for the purposes of this case where a chess club exists, the legislative history of the Act clearly indicates that the existence of chess clubs at a school would trigger application of the Act.[34] Senator Hatfield stated: "I cannot readily conceive of a criterion that could be used at this time to establish that [a chess club] as a curriculum related activity. I am not saying it could not be, because as long as you have lawyers, they can find ways of doing things one way or another." [35] The latter sentence further illustrates Congressional concern with the potential manipulation of the Act by school officials in order to circumvent its intended purposes.

Interpreting "noncurriculum related" in terms of whether or not there is a *direct* relationship with a school's curriculum courses is fully consistent with the language of the Act and its legislative history. The relatively broad definition of the types of student clubs that

[31] 130 *Cong. Rec.* S8342 (daily ed. June 27, 1984) (statement of Sen. Hatfield).

[32] *Id.*

[33] 130 *Cong. Rec.* H7732 (daily ed. July 25, 1984) (statement of Rep. Goodling).

[34] 130 *Cong. Rec.* S8342 (daily ed. June 27, 1984) (statements of Sens. Gorton and Hatfield).

[35] *Id.*

will trigger an equal access obligation under the Act differs significantly from the constitutional decisions,[36] most notably *Hazelwood School Dist. v. Kuhlmeier*, *supra*, on which Petitioners and the district court below so heavily rely.[37]

3. *A Limited Public Forum Within the Meaning of the Act Existed at Westside High School.*

Pursuant to a broad general policy which recognizes student clubs as a "vital part of the total education program as a means of developing citizenship, wholesome attitudes, good human relations, knowledge and skills," Westside High School allows its students to form their own clubs. *Mergens*, 867 F.2d at 1077. At the time of the students' request to form a Bible study club a variety of student clubs (approximately 30) existed at Westside High School, including the chess club, Interact (a service club connected to Rotary International), Zonta (the female counterpart to Interact), Subsurfers (a club for students and community members interested in scuba diving), a Student Advisory Board and a Student Forum. *Id.* If any one of these clubs is noncurriculum related, a limited public forum exists for the purposes of the Act. 20 U.S.C. § 4071(b).

As discussed above, noncurriculum related student groups are those that do not have a direct relationship to the curriculum course work of the school. Although the clubs cited above arguably are consistent with the broad educational goal of "developing citizenship, wholesome attitudes, good human relations, knowledge, and

[36] Strossen, *supra* note 24 at 162.

[37] Referring to *Hazelwood School Dist. v. Kuhlmeier*, 108 S. Ct. 562 (1988), the district court found that the facts in this case did not establish that Westside High School has a policy or practice of "indiscriminate use" of its facilities by student organizations or the general public. *Mergens*, Pet. App. B 25. This reasoning is not relevant to the application of the Act, which does not incorporate the "indiscriminate use" standard suggested in *Hazelwood*.

skills" which may indirectly be helpful in some course work, this is not enough to avoid the requirements of the Act. "Meeting" is defined in the Act to include "those activities of student groups which . . . are not directly related to the school curriculum." 20 U.S.C. § 4072(3). Therefore unless there is a more direct relationship between the clubs and the school's curriculum course work, Westside High School may not avoid its obligation to allow nondiscriminatory equal access under the Act.

In the district court school officials here attempted to justify their actions by explaining that (i) Interact and Zonta are related to sociology and psychology, and that participation can result in better grades; (ii) the chess club provides an arena for logical thinking and is, therefore, an extension of a logic class;[38] (iii) Subsurfers is related to the goals of the physical education department; and (iv) the Student Advisory Board and Student Forum are generally related to democracy, citizenship and indirectly to the classes on government. *Mergens*, Pet. App. B 21-22. The principal of Westside High School testified that, in his opinion, all clubs and activities at the school are curriculum related and are important to the overall goals and mission of the school because children who partake of activities seem to be more successful in later life. *Id.* at 23. The district court found that all of the clubs "apparently have sponsors" although "the involvement of sponsors varies from club to club." *Id.* at 22.

It is not hard to understand why the Eighth Circuit found unpersuasive the district court's reasoning that the Act did not apply. *Mergens*, 867 F.2d at 1078. The expansive approach to curriculum relatedness espoused by the Westside school officials, and adopted by the district court, provides "a vaporous non-standard . . . that in-

[38] The Eighth Circuit concluded that Westside High School does not have a logic class. *Mergens*, 867 F. 2d at 1078.

vites manipulation to achieve ends that cannot permissibly be achieved through blatant viewpoint discrimination. . ." *Hazelwood School Dist.*, 108 S. Ct. at 578 (Brennan, J., dissenting). As the Eighth Circuit recognized, a broad interpretation of "curriculum-related" renders the Act meaningless. *Mergens*, 867 F.2d at 1078. The result urged by Petitioners is precisely that which Congress sought to avoid, *i.e.*, school officials could easily circumvent the intent and application of the Act by simply requiring sponsors for voluntary student groups and proclaiming the groups to be part of the curriculum (and therefore curriculum related).[39] "A public secondary school cannot simply declare that it maintains a closed forum and then discriminate against a particular student group on the basis of the content of the speech of that group." *Id.*

The activities of several clubs were not directly related to the school curriculum course work and thus a limited public forum under the Act existed at Westside High School. 20 U.S.C. §§ 4071(b), 4072(3). Having created a limited public forum, Westside High school violated the Equal Access Act by prohibiting students from forming a Bible study club and meeting voluntarily after regular school hours. The Eighth Circuit held that "[Westside High School] maintains a limited open forum, and the [Equal Access Act] forbids discrimination against appellants' proposed club on the basis of its religious content." *Mergens*, 867 F.2d at 1079. This conclusion is entirely consistent with the statutory language of the Act and the legislative intent to prohibit discrimination and to accommodate religious discussion by students.

---

[39] "School officials, however, may not circumvent the intent and application of this Act by officially sponsoring all similar but non-religious student-initiated groups." H. R. Rep. No. 98-710, 98th Cong., 2d Sess. 6 (1984).

II. ALLOWING A VOLUNTARY STUDENT BIBLE STUDY GROUP TO MEET DURING NONINSTRUCTIONAL TIME DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE. THE ACT EFFECTS AN ACCOMMODATION OF LEGITIMATE FREE EXERCISE CONCERNS IN A WAY THAT PROTECTS RELIGIOUS LIBERTY THROUGH VOLUNTARY ACTIVITY.

Congress intended to combat the national problem of discrimination against voluntary student religious groups when it adopted the Act. The Act requires only that public secondary schools accommodate student religious groups by allowing them to meet voluntarily after school on the same basis as other noncurriculum related student groups. 20 U.S.C. § 4071. The Act's affirmative requirement is consistent with the bedrock accomodation principle enshrined in this Court's decisions. The "Constitution . . . affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any." *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984). Notwithstanding this constitutional directive, petitioners complain that avoiding discrimination through the minimal accommodation required by the Act is violative of the Establishment Clause. Effectively, Petitioners seek "to enforce a regime of total separation," *Committee for Public Educ. and Religious Liberty v. Nyquist*, 413 U.S. 756, 760 (1973), a result this Court has consistently rejected. *Lynch v. Donnelly*, 465 U.S. at 673. Such an approach violates the accommodation principle, and is not required under traditional Establishment Clause analysis.

A. Allowing Students to Meet Under the Act Does Not Violate the Establishment Clause.

Petitioners assert as a defense to application of the Act that allowing students to form a Bible study club and to meet would violate the Establishment Clause. This assertion is flatly contrary to settled authority and analy-

sis under this Court's most recent decisions. *Widmar* held that providing equal access did not violate the Establishment Clause, 454 U.S. at 272-75, and further concluded that the state's interest in avoiding the promotion of religion at state expense, even if it applied in those circumstances, was not sufficiently compelling to justify content-based discrimination against students' religious speech.[40] 454 U.S. at 276. The Court's reasoning in *Widmar* applies with equal force in the present case.

Assuming that it should apply at all (see Argument II.B, *infra*), the three-part *Lemon* Establishment Clause test[41] is satisfied. An equal access policy at Westside

[40] This brief does not address the free speech and free association issues presented in this case in detail except to note that the facts of the present case distinguish it from *Hazelwood School Dist. v. Kuhlmeier*, 108 S. Ct. 562 (1988), and *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986), where closed forums existed. Both of those cases involved school initiated activities, a school newspaper published in connection with a journalism class in *Hazelwood* and an assembly that was part of a school sponsored educational program in self-government in *Fraser*. These activities "may fairly be characterized as part of the school curriculum . . . so long as they are supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences." *Hazelwood*, 108 S. Ct. at 570. This *amicus* does agree that the Eighth Circuit, relying on *Widmar*, correctly decided these issues.

[41] *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971). In the past this *amicus* has criticized the test in briefs *amicus curiae* as being fraught with imprecision and difficulty. Although the most common decisional tool in the last two decades, it is unwieldly and has led to results inconsistent with each other as well as our nation's history and traditions.

Beginning in *Lemon* itself, Justice White criticized the "excessive entanglement" prong of the test on the grounds that it creates an "insoluble paradox." 403 U.S. at 668. In her concurrence in *Wallace v. Jaffree*, Justice O'Connor noted that *Lemon's* standards should be "reexamined and refined" to make them more useful in achieving First Amendment goals. 472 U.S. 38, 68-70 (1985). Chief Justice Rehnquist sharply criticized each prong of the *Lemon* test, and highlighted its paradoxical results. 472 U.S. at 108-13. Justice Scalia was sharply critical of the test in *Edwards v. Aguillard*, 107 S. Ct. 2573, 2593-96 (1987). Justice Kennedy has recently questioned the validity of the test in his dissent in *County of Allegheny v. American Civil Liberties Union*, 109 S. Ct. 3086, 3134 (1989). Whether this case is the vehicle for a reevaluation is debatable, because there is a more straightforward way to dispose of the case under an alternative accommodation analysis.

High School is entirely consistent with the school's secular purpose of "developing wholesome attitudes, good human relations, knowledge and skill." *Mergens*, 867 F. 2d at 1077. Such a policy would not have the primary effect of advancing religion. That the benefits are available to a variety of nonreligious student groups (approximately 30) at the high school indicates a primary secular, not religious effect. *See Widmar*, 454 U.S. at 273-74. A limited open forum at a public secondary school "does not confer any imprimatur of state approval on religious sects or activities." *Id.* at 274.[42] The students here do not seek the school's active sponsorship or involvement in their activities,[43] but in effect only its recognition and the ability to use school facilities to meet. Finally, an equal access policy is less likely to entangle Westside High School with religion than a policy of religious censorship and discrimination which would require the school not only to define religious speech but also to engage in continued monitoring of voluntary student groups to ensure that no religious speech or discussion. *See id.* at 272 n.11.

Factually, the only real distinction between this case and *Widmar* is the difference in ages between high school and university students. This is a distinction with-

[42] *See County of Allegheny v. American Civil Liberties Union*, 109 S. Ct. 3086 (1989) (plurality). A challenged governmental action can violate the Establishment Clause if it "has the effect of endorsing or disapproving religious beliefs." *Id.* at 3103.

[43] The students stressed to the School Board that they were not requesting a faculty sponsor unless required by school policy. If one were required, it would only be needed for custodial purposes. *Mergens*, 867 F.2d at 1077.

out a legal or social difference because the district court below agreed with the expert testimony that "there is no significant differences [sic] between high school and college students in their abilities to understand endorsement or nonendorsement by the school." *Mergens*, Pet. App. B 12.

The argument that high school students are likely to confuse equal access with state sponsorship of religion was explicitly rejected by the Senate Judiciary Committee. "Authors writing in leading legal periodicals have considered the issue and agree that students below the college age can understand that an equal access policy is one of State neutrality toward religion, not one of State favoritism." S. Rep. No. 98-357, 98th Cong., 2d Sess. 8 (1984).[44] Given the Congressional judgment and the findings of the district court, simply allowing students to meet voluntarily on their own after instructional time to study the Bible among themselves does not convey, and may not be reasonably perceived as, an official endorsement of religion by the school. In addition, the district court also found that "the proposed format protects against the conferring of an imprimatur or school approval." Pet. App. B 11 n.1. Ironically, in order to avoid what they perceive to be an Establishment Clause problem, the actions of the school officials here have instead created the Establishment Clause problem by inhibiting religious activity and conveying a message of disapproval of religious activity to both the students involved and the community at large.[45]

---

[44] On the question of impressionability of students, Justice Powell, author of the majority opinion in *Widmar*, noted in *Bender v. Williamsport Area School Dist.*, that "I do not believe—particularly in this age of massive media information—that the few years difference in age between high school and college students justifies departing from *Widmar*." 475 U.S. 534, 556 (1986) (Powell, J., dissenting).

[45] *See County of Allegheny v. American Civil Liberties Union, supra* note 42.

B. Accommodation of Voluntary Student Religious Groups Protects Religious Liberty Guaranteed by the First Amendment. The Establishment Clause May Not and Should Not Be Used As a Tool to Inhibit the Free Exercise of Religion.

The two Religion Clauses must be construed harmoniously to further their common goal of ensuring religious liberty. "[T]he Religion Clauses had specifically and firmly fixed the right to free exercise of religious beliefs, and buttressing this fundamental right was an equally firm, even if less explicit, prohibition against the establishment of any religion by government." *Wisconsin v. Yoder*, 406 U.S. at 214. Accommodation was firmly established as a constitutional principle in *Zorach v. Clauson* where the Court held that when the state accommodates the public service to the spiritual needs of its citizens, it follows the best of this country's traditions—"[t]o hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups." 343 U.S. 306, 314 (1952). "Government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause." *Hobbie v. Unemployment Appeals Comm'n of Florida*, 480 U.S. 136, 144-45 (1987). "Any interpretation of [the Establishment Clause] and the constitutional values it serves must also take into account the free exercise clause and the values it serves. P. Kauper, *Religion and the Constitution*, 79 (1964)." *Meek v. Pittenger*, 421 U.S. 349, 395 (1975) (Rehnquist, J., dissenting).

Without more, simply accommodating the religious beliefs of religious groups can hardly be characterized as sponsorship or endorsement of, or active involvement with, religion violative of the Establishment Clause. *See Wisconsin v. Yoder*, 406 U.S. at 234 n. 22. "[T]he Free Exercise Clause . . ., by its terms, gives special protection

to the exercise of religion." *Thomas v. Review Board*, 450 U.S. 707, 713 (1980). The right to free exercise of religion undoubtedly includes scripture reading and study of the Bible. Congress was concerned that for public school authorities to discriminate on the basis of the religious content of speech at voluntary student-initiated meetings would constitute a violation of the right to free exercise of religion of the students involved. Thus, the Act had as its core the accommodation of religion.[46]

This *amicus* has been concerned for some time with the danger that the Establishment Clause can and has been used to undermine the accommodation principle. This danger stems in part from the unfortunate incorporation of "Jefferson's misleading [wall of separation] metaphor" into constitutional adjudication. *Wallace v. Jaffree*, 472 U.S. 38, 92 (1985) (Rehnquist, C.J., dissenting). The "Constitution [does not] require complete separation of church and state; it affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any." *Lynch v. Donnelly*, 465 U.S. at 673. Unfortunately the impression has been created for some that "the Establishment Clause not only mandates religious neutrality but also requires that this Court go further and throw its weight on the side of those who believe that our society as a whole should be a purely secular one. Nothing in the First Amendment . . . requires such an extreme result." *Meek v. Pittenger*, 421 U.S. at 395.

---

[46] Although the Court need not decide it here, accommodation is not boundless and in some situations efforts to accommodate religious beliefs are found to violate the Establishment Clause. *See Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985), where a state statute which provided Sabbath observers with an absolute and unqualified right not to work on their Sabbath was held to violate the Establishment Clause. That is, however, clearly distinguishable from mandating equal treatment for religious and non-religious groups.

The Establishment Clause cannot be read to include "a [governmental] philosophy of hostility to religion," *Zorach v. Clauson*, 343 U.S. at 315, yet it has been used in such a way to create just that impression. Certain groups routinely threaten public school officials with expensive and protracted litigation over almost every matter involving religion and public schools. It is no wonder that the Senate Judiciary Committee found that the "critical rights of freedom of speech and free exercise of religion are being denied in the very places where they should be taught, our Nation's schools, not because school authorities are hostile to religion, but because they fear expensive lawsuits."[47] Witness after witness testified before the Senate Judiciary Committee about the existence of the tragic perception of state hostility toward religious speech among students and citizens.[48] This is an especially dangerous trend because it isolates religion from the educational process at a time when values are formed and conscience is molded:

> [T]o be silent about religion may be, in effect, to make the public school an antireligious factor in the community. Silence creates the impression in the minds of the young that religion is unimportant and has nothing to contribute to the solution of the perennial and ultimate problems of human life.[49]

Whether the almost phobic treatment of religious speech and religious groups by some public school officials results from a genuine fear of Establishment Clause litigation, or indifference or outright hostility to religion, is not the issue. Whatever the reason the result is the same—students are subjected to discrimination and their

---

[47] S. Rep. 98-357, 98th Cong., 2d Sess. 14 (1984).

[48] *Id.* at 10.

[49] *American Council on Education, The Function of the Public Schools in Dealing With Religion*, 6 (1953). *See* S. Rep. No. 357, 98th Cong., 2d Sess. 14-21 (1984).

First Amendment rights are being trampled, often times in the name of the Establishment Clause as happened in this case at Westside High School. This is precisely what Congress sought to remedy when it enacted the Equal Access Act.

The Establishment Clause does not license government to treat religion and those who teach or practice it, simply by virtue of their status, as subversive of American ideals and therefore subject to unique disabilities. *McDaniel v. Paty*, 435 U.S. 618, 641 (1978) (Brennan, J., concurring). Not "a sword to justify repression of religion, the Establishment Clause, properly understood [as buttressing the Free Exercise Clause], acts as a shield against any attempt to inhibit religion," *id.*, as the public school officials attempted in this case. "[I]t seems doubtful that sacrificing religious freedom on the altar of anti-establishment would do justice to the hopes of the framers." L. Tribe, *American Constitutional Law*, § 14-8, p. 1204 (2d ed. 1988)[50]

By denying the students here the opportunity to meet voluntarily after regular school hours, Petitioners have demonstrated precisely the "callous indifference" and "hostility to religion" against which *Zorach* warned. 343 U.S. 314-315. This Court should not and cannot allow government actions, such as those of Petitioners, to pervert the Establishment Clause into a tool against religion and thereby erode the accommodation principle which is at the core of the Religion Clauses and our public life.

---

[50] During consideration of the Act Professor Tribe testified that for public school authorities to discriminate on the basis of the religious content of speech at voluntary student-initiated meetings would constitute a violation of the right to free exercise of religion of the students involved. *Hearings Before the Subcommittee on Elementary, Secondary, and Vocational Education of the Committee on Education and Labor, House of Representatives, on H.R. 4996*, 98th Cong., 2d Sess. 45 (1984).

CONCLUSION

For the foregoing reasons, the judgment of the Eighth Circuit should be affirmed.

Respectfully submitted,

MARK E. CHOPKO*
General Counsel

JOHN A. LIEKWEG
Associate General Counsel

UNITED STATES CATHOLIC CONFERENCE
3211 4th Street, N.E.
Washington, D.C. 20017
(202) 541-3300

*Counsel of Record